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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. DANIEL PATRICK MOYNIHAN, Appellant.	)	2 CA-CR 2007-0112 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20054238

Honorable Hector Campoy, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and William Scott Simon — Phoenix
Attorneys for Appellee

Wanda K. Day — Tucson
Attorney for Appellant

H O W A R D, Presiding Judge.

¶1 After a jury trial, appellant Daniel Moynihan was convicted of one count of continuous sexual abuse of a minor. The trial court sentenced him to a partially mitigated prison term of fifteen years. On appeal, he argues the trial court erred in denying his motion to preclude the expert testimony of Wendy Dutton about the general characteristics of child victims of sexual abuse. Finding no error, we affirm.

¶2 Moynihan first argues that, because Dutton had no knowledge about the facts of this case, Moynihan was unable to cross-examine her effectively. We review de novo a trial court's decision implicating the Confrontation Clause of the Sixth Amendment. *See State v. Tucker*, 215 Ariz. 298, ¶ 61, 160 P.3d 177, 194, *cert. denied*, ___ U.S. ___, 128 S. Ct. 296 (2007). The Confrontation Clause guaranteed Moynihan only the opportunity to test Dutton's testimony and credibility by cross-examining her. *See Davis v. Alaska*, 415 U.S. 308, 315-16 (1974); *see also State v. Carreon*, 210 Ariz. 54, ¶ 36, 107 P.3d 900, 909 (2005). Moynihan had that opportunity here and in fact cross-examined Dutton. Moynihan's argument is essentially that Dutton's testimony should have been precluded because he could not cross-examine her about the characteristics of the victim in this case—information about which she was prohibited from testifying. *See State v. Lindsey*, 149 Ariz. 472, 475, 720 P.2d 73, 76 (1986) (expert on victim behavior cannot testify directly to "probabilities of the credibility of another witness"). We know of no authority supporting Moynihan's position, and he cites none. Because Moynihan had the opportunity to, and did, cross-examine Dutton, we find no Confrontation Clause violation.

¶3 Moynihan next argues Dutton's testimony was irrelevant and unfairly prejudicial. We review the trial court's decision to admit Dutton's testimony for an abuse

of discretion. *See Lindsey*, 149 Ariz. at 473, 720 P.2d at 74; *State v. Rojas*, 177 Ariz. 454, 459, 868 P.2d 1037, 1042 (App. 1993). Here, the child victim reported the abuse to a friend rather than authority figures and did not remember all details accurately. Dutton's testimony, including that adolescents "are more likely . . . to tell friends" and that victims often "delay disclosure" and have difficulty remembering details of abuse, was relevant to help the jury understand the general behavior of victims. *See* Ariz. R. Evid. 401 (evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"); *Rojas*, 177 Ariz. at 459, 868 P.2d at 1042 (testimony about general characteristics of sexual-abuse victims admissible to help jury understand behavior of such victims).

¶4 Moynihan claims that the set of characteristics about which Dutton testified has been discredited as a diagnostic tool and is not backed up by scientific evidence. But those characteristics were not used here as a diagnostic tool; rather, they were used as one possible explanation for the victim's behavior. And Dutton's testimony—which was based on her study and observations—was admissible. *See Logerquist v. McVey*, 196 Ariz. 470, ¶ 30, 1 P.3d 113, 123 (2000); *see also State v. Lucero*, 207 Ariz. 301, ¶ 19, 85 P.3d 1059, 1063 (App. 2004) (applying *Logerquist* in criminal context). Moynihan's argument does not effectively call into question the admissibility of testimony on the general behavior of child victims of sexual abuse. *See Lindsey*, 149 Ariz. at 474, 720 P.2d at 75.

¶5 The record also supports the trial court's implicit conclusion that the danger of unfair prejudice did not substantially outweigh the probative value of Dutton's testimony.

See Ariz. R. Evid. 403; *State v. Moran*, 151 Ariz. 378, 384, 728 P.2d 248, 254 (1986) (trial court has discretion to exclude general behavior testimony on Rule 403 grounds). Dutton made clear that she knew nothing about the facts of this case and that the general characteristics she described did not necessarily apply to this case. *See State v. Curry*, 187 Ariz. 623, 629, 931 P.2d 1133, 1139 (App. 1996) (finding no unfair prejudice created by Dutton's testimony where she clarified limitations of testimony and that characteristics described did not alone indicate abuse had occurred). And, contrary to Moynihan's suggestion, Dutton's general testimony was not an indirect opinion about the victim's credibility in violation of *Lindsey*; instead, it was the very type of general testimony allowed by *Lindsey*. *See* 149 Ariz. at 473-74, 720 P.2d at 74-75. Because Dutton's testimony was relevant and the trial court could reasonably have concluded any danger of unfair prejudice did not substantially outweigh its probative value, we find no abuse of discretion.

¶6 For the foregoing reasons, we affirm Moynihan's conviction and sentence.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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J. WILLIAM BRAMMER, JR., Judge